(21) (20)

Nos. 89-1391, 89-1392

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DR. IRVING RUST, on behalf of himself, his patients, and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

THE STATE OF NEW YORK, THE CITY OF NEW YORK, THE NEW YORK CITY HEALTH & HOSPITALS CORP.,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS, THE CENTER FOR CONSTITUTIONAL RIGHTS,

(Amici continued on inside cover)

JAMES M. SHANNON
Attorney General of Massachusetts
RUTH A. BOURQUIN
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

DAVID D. COLE
(Counsel of Record)
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6464

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH
AMERICANS FOR DEMOCRATIC ACTION
AMERICAN JEWISH CONGRESS
THE AMERICAN VETERANS COMMITTEE, INC.
ARTICLE 19, INTERNATIONAL CENTRE ON CENSORSHIP
BOSTON WOMEN'S HEALTH BOOK COLLECTIVE
BUSINESS AND PROFESSIONAL WOMEN/USA
CATHOLICS FOR A FREE CHOICE
CATHOLICS FOR CHOICE OF ST. LOUIS
THE CENTER FOR WOMEN POLICY STUDIES
COALITION FOR CHOICE OF VALPARAISO SCHOOL OF LAW
D.C. RAPE CRISIS CENTER
THE DOMESTIC VIOLENCE CENTER OF CHESTER COUNTY
FEDERATION OF RECONSTRUCTIONIST CONGREGATIONS AND HAVUROT
FLORIDA ASSOCIATION FOR WOMEN LAWYERS, DADE CHAPTER, INC.
THE FUND FOR FREE EXPRESSION
THE GAY MEN'S HEALTH CRISIS
HADASSAH
HAWAII WOMEN LAWYERS
HOLLYWOOD WOMEN'S POLITICAL COMMITTEE
INSTITUTE OF WOMEN TODAY
THE JEWISH LABOR COMMITTEE
JOURNAL OF WOMEN'S HISTORY
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
LAWYERS FOR REPRODUCTIVE RIGHTS
LEARNING ALLIANCE
NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC.
NATIONAL COALITION OF AMERICAN NUNS
NATIONAL CONFERENCE OF BLACK LAWYERS
THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE
NATIONAL GAY RIGHTS ADVOCATES
NEW YORK WOMEN IN CRIMINAL JUSTICE
OAKHURST PRESBYTERIAN CHURCH (GEORGIA)
THE ORGANIZATION FOR BLACK STRUGGLE
P.E.N. AMERICAN CENTER
POPULATION COMMUNICATION
THE POPULATION COUNCIL
POPULATION CRISIS COMMITTEE
PRO-CHOICE NETWORK OF WESTERN NEW YORK, INC.
PRO-CHOICE RESOURCES
REFUSE AND RESIST!
THE RELIGIOUS COALITION FOR ABORTION RIGHTS
SOUTHERN STUDENTS FOR CHOICE
THE SOUTHWEST COALITION FOR CHOICE
TARRANT COUNTY, TEXAS CHOICE NETWORK
TRANSNATIONAL FAMILY RESEARCH INSTITUTE
THE UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA
UNITED STATES STUDENT ASSOCIATION
WOMEN EMPLOYED
WASHINGTON WOMEN UNITED
WOMEN'S ALLIANCE THEOLOGY, ETHICS AND RITUAL
WOMEN'S AMERICAN ORT
THE WOMEN'S LAW CENTER, INC.
WOMEN LAWYERS' ASSOCIATION OF LOS ANGELES
WOMEN LAWYERS' ASSOCIATION OF MICHIGAN
WOMEN'S MEDICAL FUND, INC.

AS AMICI CURIAE IN SUPPORT OF PETITIONERS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases PAGE

Statutes and Regulations

Miscellaneous

INTERESTS OF AMICI CURIAE

Amici curiae, the Commonwealth of Massachusetts and 57 organizations, share a common commitment to safeguarding fundamental First Amendment freedoms.[1] This brief focuses on the First Amendment issues presented by this case, and on the implications for a free marketplace of ideas if the government is permitted to enforce the regulations challenged here.[2]

Counsel for amici—the Center for Constitutional Rights and the Attorney General of Massachusetts—were counsel for plaintiffs in *Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53 (1st Cir. 1990) (*en banc*), *petition for cert. filed*, No. 89-1929 (June 11, 1990), which resulted in a nationwide injunction against the regulations at issue here.

STATEMENT OF THE CASE

A. Statement Of Facts

Title X of the Public Health Services Act, 42 U.S.C. § 300 *et seq.* (1982), was enacted in 1970 as the Family Planning Services and Population Research Act (hereinafter "Title X"). Title X is designed to provide a comprehensive program of family planning services for the "over five million American women [who] are denied access to modern, effective, medically safe family planning services due to financial need." 116 Cong. Rec. S24,093 (1970) (Statement of Sen. Yarborough).[3]

While Title X clinics may not provide abortions, 42 U.S.C. § 300a-6, for nearly twenty years the government interpreted

---

1 Individual descriptions of the amici are set forth in the appendix.

2 The Commonwealth of Massachusetts endorses the arguments set forth in the Amici Brief of the Attorneys General of Ohio and several other states filed in this action.

3 *See* Pub. L. No. 91-572, § 2 (1970). *See also* H. R. Rep. No. 1472, 91st Cong. 2d Sess. 4, *reprinted in* 1970 U.S. Code Cong. and Admin. News 5068; H.R. Conf. Rep. No. 1567, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5080-82.

Title X to allow non-directive counseling about and referral for abortions where health care professionals deemed such counseling or referral appropriate, and indeed, in some situations, to require it.[4] During this twenty-year period, Congress repeatedly rejected attempts to amend Title X to prohibit abortion-related counseling and referrals.

On February 2, 1988, the Secretary of Health and Human Services sought to accomplish through regulation what Congress had refused to do through legislation: to prohibit non-directive counseling and referral by barring all information about abortion. He promulgated regulations that: (1) prohibit a Title X program from counseling about or making referrals for abortions, even where the health care provider believes such counseling and referral is medically indicated, 42 C.F.R. § 59.8(a)(1); (2) require Title X recipients to provide a pregnant woman with "a list of available providers that promote the welfare of mother and unborn child," and "information necessary to protect the health of the mother and unborn child until . . . the referral appointment is kept," 42 C.F.R. § 59.8(a)(2); and (3) bar Title X recipients from "encourag[ing], promot[ing], or advocat[ing] abortion as a method of family planning," while imposing no restrictions on anti-abortion advocacy. 42 C.F.R. § 59.10.[5] Thus, receipt of Title X funds is conditioned on the medical counselor providing a woman with information designed to protect the life of the "unborn child" and refraining from offering any information about the availability or appropriateness of abortion.

---

4 Non-directive counseling includes informing the patient that abortion and childbirth are her options, and providing information about the relative risks of abortion and childbirth in her particular case. *See, e.g.*, Affidavit of Drisgula at ¶¶ 8,20 (Joint Appendix ("JA") 150, 154); Affidavit of Murray at ¶¶ 11-14 (JA 236-37); Affidavit of Sammons at ¶ 6 (JA 262-63); United States Dept. of HEW, Program Guidelines for Project Grant for Family Planning Services (Jan. 1976) (JA 51); Memorandum from Office of the General Counsel, Dept. of HEW (April 14, 1978) (JA 56-57).

5 Counsel for the Secretary represented that this provision bars Title X clinics even from providing the Yellow Pages to a client, since it lists abortion facilities. *See New York v. Sullivan*, 889 F.2d 401, 417 (2d Cir. 1989) (Kearse, J., dissenting); *id.* at 415 (Cardamone, J., concurring).

These restrictions apply not only to the federal grant funds actually appropriated by Congress, but to "all funds allocated to the Title X program, including but not limited to, grant funds, grant-related income or matching funds." 42 C.F.R. § 59.2. Hence, if a provider is to receive federal Title X monies, it may not use funds generated for that project through paying patients or other non-federal sources to support counseling about or referrals for abortions, or for any other activities that may have the effect of assisting or encouraging abortion.

In addition, the regulations require not only financial but also *physical* separation of the Title X program from activities deemed prohibited by §§ 59.8 and 59.10. 42 C.F.R. § 59.9. Thus, under the regulations, even if a grantee can demonstrate that its federal funds are being used solely for Title X-approved activities, it must also physically separate its Title X project from other services provided with non-federal monies.

B. Procedural History

The regulations at issue here were challenged in four separate lawsuits across the country. In the case currently before the Court, the district court for the Southern District of New York dismissed the action, and the court of appeals affirmed, over Judge Amalya Kearse's dissent. *New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988), *aff'd*, *New York v. Sullivan*, 889 F.2d 401. The Second Circuit found the regulations consistent with the Title X statute, and found no constitutional infirmities.

In the three other lawsuits, district courts for the District of Massachusetts, the District of Colorado, and the District of West Virginia invalidated all or a portion of the regulations on statutory and constitutional grounds. *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988); *Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465 (D. Colo. 1988), 687 F. Supp. 540 (D. Colo 1988), *appeal pending*, No. 88-2251 (10th Cir. argued May 11, 1989); *West Vir-*

ginia Association of Community Health Centers, Inc. v. Sullivan, No. 2:89-0330 (D.W.Va. Mar. 1, 1990).

In *Massachusetts v. Bowen*, the district court entered a nationwide injunction, holding the regulations violative of privacy rights and the First Amendment. 679 F. Supp. 137. That decision was affirmed by a panel of the Court of Appeals for the First Circuit. *Massachusetts v. Secretary of Health and Human Services*, No. 88-1279 (1st Cir. May 8, 1989). The First Circuit granted rehearing *en banc*, and on March 19, 1990, the *en banc* court affirmed the injunction. *Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53 (1st Cir. 1990) (*en banc*). The court found the expanded definition of project funds inconsistent with the Title X statute, and held that the remainder of the regulations violated plaintiffs' privacy and First Amendment rights.

SUMMARY OF ARGUMENT

The regulations challenged in this case are unprecedented in the annals of public medicine. Never before has the federal government sought to support a medical counseling program in which physicians are forbidden from providing full information to patients concerning available options for treating a medical condition. It is virtually unthinkable that the government would establish such a program in any other medical context; one cannot imagine, for example, a government-funded cancer counseling program in which physicians are barred from giving referrals for or even discussing chemotherapy as one option for treatment.

The regulations directly dictate the message that Title X grantees must impart on a subject of public controversy. They forbid counseling or referrals about abortion, while requiring counseling and referrals directed toward preserving the health of the "unborn child." 42 C.F.R. § 59.8. They forbid advocacy in favor of abortion, while permitting anti-abortion advocacy. 42 C.F.R. § 59.10. And they instruct Title X counselors, if asked specifically about abortion, to say that it is not "an appropriate method of family planning." 42 C.F.R. § 59.8(b)(5). In short, they transform what was historically a neutral family planning counseling program into a mechanism for providing one-sided information skewed to the Administration's particular political viewpoint on abortion.

The regulations' central flaw under the First Amendment can best be demonstrated by imagining the same sort of regulations drafted by a government that favored abortion over childbirth.[6] It is doubtful that the Administration would find permissible as a First Amendment matter a Title X program that mandated counseling and referrals *only* about abortion, barred counseling about maintaining the health of the "unborn child," and instructed counselors when asked about childbirth to say that it is not "appropriate." The First Amendment would forbid such a program for the same reason that it forbids the current regulations: both violate the fundamental requirement of government neutrality.

The regulations violate the principle of neutrality in two ways. First, they are unconstitutionally viewpoint-based, because they have the purpose and effect of suppressing speech of one viewpoint, speech about the option of abortion, while mandating speech about the other option, childbirth. While the government may have somewhat wider latitude in the context of subsidies than where it absolutely prohibits speech, that latitude does not free it from the First Amendment mandate of viewpoint neutrality.

Second, the regulations draw content-based lines that are impermissible in a counseling context. Because a counseling relationship is especially conducive to influence and coercion, a heightened degree of government neutrality is mandated here: the government may not impose content-based restrictions that preclude the provision of information relevant to the decision whether to bear a child. Thus, once the government decides to provide post-pregnancy counseling and refer-

---

6 In a world beset by overcrowding, this is by no means a wholly speculative possibility. In China, for example, government officials adopted far more extreme measures to "encourage" no more than one child per family. L. Tribe, *Abortion: The Clash of Absolutes* 62-63 (1990).

ral, as it has here, it may not suppress relevant information about abortion or childbirth.

The regulations also violate the First Amendment because their restrictions extend beyond the government's own funds, and place conditions on the clinics' ability to speak on the topic of abortion with their own resources. Through their matching-fund and separation requirements, the regulations effectively penalize grantees who use private monies to counsel about, refer for, or encourage abortion.

That the Secretary of Health and Human Services would impose such unparalleled restrictions on family planning counseling only underscores the political sensitivity of the abortion issue. But precisely because abortion is at once an extremely controversial political subject and an important personal decision, the government must not be permitted either to suppress expression about abortion, or to inculcate unsuspecting women with its particular political preferences by providing one-sided counseling slanted towards the government's point of view.

ARGUMENT

I. THE REGULATIONS VIOLATE THE FIRST AMENDMENT BECAUSE THEY ARE DESIGNED TO SUPPRESS EXPRESSION OF THE IDEA THAT ABORTION IS AN OPTION

The principle of viewpoint neutrality is central to the First Amendment tradition. It applies not only to criminal prohibitions but also to the allocation of subsidies, and is designed to ensure that the government does not use its institutional advantage to monopolize or impermissibly influence the marketplace of ideas. Thus, the Secretary correctly conceded in the First Circuit that "[t]he fact that grant conditions define the scope or extent of the government's subsidy does not insulate the conditions from constitutional challenge" where the regulations are " 'aim[ed] at the suppression of dangerous ideas.' " Appellant's Supplemental Brief in *Massachusetts v. Secretary of Health and Human Services*, No. 88-1279 (1st Cir. Brief filed Sept. 18, 1989) (hereinafter "Sec. Supp. Br.") at 18 (*quoting Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983) (*quoting Cammarano v. United States*, 358 U.S. 498, 513 (1959)).

The regulations challenged here are designed to suppress a particular idea that the Administration considers "dangerous"—that abortion is an option. Accordingly, they are unconstitutionally viewpoint-based.

A. The Regulations Are Viewpoint-Based

Under the challenged regulations, a woman who learns in a Title X clinic that she is pregnant may not be counseled about the option of abortion, but must be counseled on how to protect the health of her "unborn child." 42 C.F.R. § 59.8(a)(2). She must be offered a referral list of prenatal care providers "that promote the welfare of mother and unborn child," a list which may not include any facility that principally provides abortions. 42 C.F.R. § 59.8(a)(3).[7] If she specifically asks about abortion, she is to be told that "the project does not consider abortion an appropriate method of family planning," but can "help her to obtain prenatal care and necessary social services." 42 C.F.R. § 59.8(b)(5). Even if in the best judgment of her physician she should consider having an abortion (because, for example, she has extremely high blood pressure or AIDS), she may not be given even basic information about abortion or a referral to an abortion counselor.

There is no question that these regulations are designed to suppress a particular idea of which the government disapproves. Indeed, the Secretary admits that they are intended to send the "message . . . that the federal government does not sanction abortion." Preamble, 53 Fed. Reg. 2944 (1988); *id.* at 2943 (regulations "exhibit a bias in favor of childbirth and against abortion"). As the First Circuit found, the regula-

---

7 For the most part, the only abortion providers that do not principally provide abortion are hospitals, which are often inaccessible for poor women. *See* Affidavit of Gordon at ¶¶ 13-14 (JA 180-84); Affidavit of Drisgula at ¶ 28 (JA 156); Declaration of Henshaw at ¶ 12 (JA 192).

tions "slant the content of the relevant counseling in an 'anti-abortion' direction." *Massachusetts v. Secretary of Health and Human Services*, 899 F.2d at 73.

The Secretary argued in the First Circuit that the regulations were promulgated to limit Title X to "preventive family planning," *i.e.*, counseling and services *prior to* conception. Sec. Supp. Br., *supra* at 1. That argument is belied by the regulations themselves. While the regulations specifically prohibit counseling about abortion, they do not forbid counseling or referrals on *any* other medical issue that might arise in a post-pregnancy counseling context. Thus, if a woman comes into a Title X clinic to receive the results of her pregnancy test and it becomes apparent that she needs information about any other medical treatment, her physician is permitted to counsel or refer her concerning that treatment. Of all the post-pregnancy subjects that might arise, *only* speech about abortion is suppressed.

Instead of neutrally barring all post-pregnancy counseling, the regulations single out for suppression, through enforced silence and affirmative discouragement, only one of the two post-pregnancy options. A neutral limitation of Title X to "preventive family planning" would not mandate one-sided counseling or biased referral lists. Neutral regulations would be equally responsive to women who ask about abortion or childbirth. Under the Secretary's regulations, however, only the patient who asks about childbirth receives responsive information and an appropriate referral. The woman who asks about abortion receives no information about abortion, is told that abortion "is not an appropriate method of family planning," and is offered a referral for prenatal care. *Compare* § 59.8(b)(1) *with* § 59.8(b)(5).

Moreover, if the government were neutrally attempting to restrict Title X to "preventive family planning," it would forbid projects to "encourage, promote, or advocate" not only abortion, but also childbirth (and, presumably, innumerable other topics). § 59.10. Yet it chose to bar only pro-abortion advocacy.[8]

The Second Circuit nonetheless found the regulations viewpoint-neutral. It concluded that because no "[a]rgumentation pro or con as to the advisability of an abortion" is required or authorized, "[t]he woman is thus under no pressure as a result of the regulations to accept or reject the services offered." *New York v. Sullivan*, 889 F.2d 401, 414 (2d Cir. 1989).

To suggest that a counselee will not be affected by one-sided counseling and referral is to ignore the realities of a counseling relationship. *See* Section I.C.1, *infra*. Nor is "argumentation pro or con" a necessary component of viewpoint suppression. Under the Second Circuit's rationale, a voter counseling program that provided information only about Republican candidates and barred discussion of Democratic candidates would be "viewpoint-neutral" as long as it did not require or authorize argumentation.

A regulation is viewpoint-neutral only when it " 'does not favor either side of a political controversy,' " *Boos v. Barry*, 485 U.S. 312, 319 (1988) (*quoting Consolidated Edison Co.*

---

8 As the First Circuit correctly noted, appellate counsel's *post hoc* assurance that § 59.10 is not viewpoint-based because it prohibits *all* advocacy concerning abortion, pro or con, is "factually untenable" on the face of the regulations. *Massachusetts*, 899 F.2d at 75. In addition to the biased substantive language of § 59.10(a), every example of prohibited advocacy in § 59.10(b) concerns *pro*-abortion activity. *Id.* (citing regulations). Indeed, the regulations admit that "§ 59.10, like the remainder of the rules below, does exhibit a bias in favor of childbirth and against abortion." Preamble, 53 Fed. Reg. at 2943.

" 'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.' " *FTC v. Sperry and Hutchinson Co.*, 405 U.S. 233, 246 (1972) (*quoting Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971)). Even agency members lack authority to effect *post hoc* emendations of written regulations under challenge in the courts. *Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1177 n.3 (2d Cir. 1977) ("no particular weight to be given to an administrative interpretation of a regulation 'made after [the] controversy had arisen' ") (*quoting Fleming v. Van Der Loo*, 160 F.2d 906, 912 (D.C. Cir. 1947)); *American Iron and Steel Inst. v. EPA*, 568 F.2d 284, 296-97 (3d Cir. 1977).

v. Public Service Commission, 447 U.S. 530, 537 (1980)), and does not "regulat[e] speech in ways that favor some viewpoints or ideas at the expense of others." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). Here, the Secretary has admitted what is evident on the face of the regulations: they "exhibit a bias in favor of childbirth and against abortion." 53 Fed. Reg. at 2943. The provision of one-sided information and referral in counseling toward a decision that by definition involves a choice between two options cannot be said to be viewpoint-neutral without robbing that term of all meaning.

In addition to the face of a regulation, the Court looks to the government's underlying interest in determining whether a regulation is neutral as to the content or viewpoint of expression. *See, e.g., United States v. Eichman*, 58 U.S.L.W. 4744, 4745 (U.S. June 11, 1990) ("Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is 'related to the suppression of expression' ") (original emphasis); *Boos v. Barry*, 485 U.S. at 320 (neutral statute must be " '*justified* without reference to the content of the regulated speech' ") (original emphasis) (*quoting Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

Here, the only stated and indeed conceivable government interest is to suppress expression about abortion. Once the government decides to fund counseling and referral about any post-pregnancy options, it does not save money by permitting only one-sided counseling and referral. A neutral referral list does not cost any more than a biased one, nor is a neutral conversation about options more costly than a one-sided conversation. Thus, the *only* interest the government has in forbidding counseling about abortion is its ideological disapproval of that idea, and that interest is presumptively illegitimate. "There are some purported interests—such as a desire to suppress support for . . . an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate that

they would immediately invalidate the rule." *Taxpayers for Vincent*, 466 U.S. at 804.

B. The First Amendment Requires at a Minimum that Government Conditions on Allocation of Resources or Funding be Viewpoint-Neutral

Were the government to prohibit all family planning counselors from counseling about or advocating abortion, while compelling them to counsel about the care of the "unborn child," there is no dispute that its regulations would impose an unconstitutional viewpoint-based restraint on the freedom of expression.[9] The fact that the restrictions attach to government funding does not render them any less viewpoint-based.

The question this case raises therefore is whether the government may achieve indirectly, through a funding condition, what it is constitutionally forbidden from doing directly.[10] The Second Circuit held that it may, because so long as the restrictions can be characterized as a " 'decision not to subsidize the exercise of a fundamental right,' " they " 'do[ ] not infringe the right.' " 889 F.2d at 412 (*quoting Regan v. Taxation With Representation*, 461 U.S. at 549).

But this statement of the law is true only in a very limited sense, not applicable here. It is true that the Constitution does not generally impose affirmative requirements on the government to subsidize the exercise of constitutional rights. *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3052 (1989); *Regan*, 461 U.S. at 549. It is equally well-established, however, that in the absence of a compelling state interest, the First Amendment restricts the government's

---

9 *See, e.g., Bigelow v. Virginia*, 421 U.S. 809 (1975) (statute prohibiting publications encouraging abortion violates First Amendment); *Schacht v. United States*, 398 U.S. 58, 63 (1970) (striking down viewpoint-based regulation governing wearing of military uniforms); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633-34 (1943) (government cannot require affirmation of government-sponsored message through flag salute in public schools).

10 *See Speiser v. Randall*, 357 U.S. 513, 526 (1958) (First Amendment prohibits government from indirectly "produc[ing] a result which [it] could not command directly").

ability to *selectively* subsidize speech on one side of a controversial issue. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Regan*, 461 U.S at 548.

Thus, if the government supported no counseling at all, plaintiffs could not argue that they have a constitutional right to have the government provide such services. Here, however, the government has chosen to subsidize some counseling, but only on one side of an inherently two-sided issue. The Court has consistently held that once the government chooses to support some expression in a particular forum, it must at a minimum maintain neutrality vis-a-vis the viewpoint of the speech.

As the Secretary conceded, the government may not discriminate in the provision of subsidies in such a way as to " 'aim[ ] at the suppression of dangerous ideas.' " *Regan*, 461 U.S. at 548 (*quoting Cammarano*, 358 U.S. at 513). Thus, where the government chooses to support some speech, it cannot avoid First Amendment scrutiny by maintaining that it is "merely" declining to subsidize other speech. Indeed, the Court rejected precisely that argument in *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, a First Amendment challenge to a subsidy program that offered a tax exemption to religious, professional, trade, and sports magazines, but not to general interest magazines. The dissenters in *Ragland* argued, as the Second Circuit held in this case, that because the government was not prohibiting any expression, but merely declining to subsidize particular types of magazines, its actions did not infringe the First Amendment. 481 U.S. at 236 (Scalia, J., dissenting). The majority rejected that position, however, and held that because the statute selectively subsidized speech based on content, it was unconstitutional under the First Amendment absent a compelling state interest. 481 U.S. at 230.[11]

11 Even the dissenters in *Ragland* agreed that stringent First Amendment scrutiny is appropriate "when the subsidy pertains to the expression of a particular viewpoint on a matter of political concern—a tax exemption, for example, that is expressly available only to publications that take a particular point of view on a controversial issue." *Ragland*, 481 U.S. at 237 (Scalia, J., dissenting); *see also Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946) (construing statute governing allocation of second-class mailing privileges, "a form of subsidy," to prohibit judgments based on the quality of the publications' content, because to allow such judgments would authorize impermissible censorship).

The principles articulated in *Regan* and *Ragland* are particular applications of a general mandate of government neutrality in the support of speech. The Court set forth the general rule most clearly in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), which challenged an ordinance that allowed access to public property for labor picketing but not other picketing. The Court held the ordinance unconstitutional because it failed to maintain strict neutrality:

> government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas' and government must afford all points of view an equal opportunity to be heard.

Mosley, 408 U.S. at 96.[12]

12 *Mosley*, like other public forum cases, concerns the extent to which the First Amendment limits the government's selective support of expression through access to its property. These cases uniformly mandate viewpoint neutrality, even where the government has not opened property to public expression. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (in non-public forum, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"); *see also id.* at 833 (1985) (Stevens, J., concurring) (even in a non-public forum, "[e]veryone on the Court agrees that the exclusion . . . is prohibited by the First Amendment if it is motivated by a bias against the views of the excluded groups"); *United States Postal Service v. Council of Greenburgh Civic Association*, 453 U.S. 114, 132 (1981) (in context of denial of access to non-public forum letterboxes, "if a governmental regulation is based on the context of the speech or the message, that action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's view' ").

Under the Second Circuit's approach in this case, the Chicago Police Department in *Mosley* could have avoided the dictates of the First Amendment by arguing that it was merely declining to subsidize (through access to public property) certain forms of picketing, and that picketers were free to picket elsewhere. But the Court ruled that the government must remain neutral in choosing which picketers to support, and struck down the ordinance because it failed to respect that neutrality.

To require neutrality in government support of speech is *not* to recognize an affirmative right to have one's speech subsidized. Rather, it is simply to enforce the " 'equality of status in the field of ideas' " that the Court recognized in *Mosley*. 408 U.S. at 96. There is no affirmative requirement that the government subsidize the press, but once it chooses to do so it must not discriminate based on the content of particular media. *Ragland*, 481 U.S. 221. And while the government need not establish or support public universities or libraries at all, once it decides to do so it may not base its determination of which books to maintain,[13] which teachers to employ,[14] or which student groups to support,[15] on the basis of whether government officials approve of their particular political views.

Similarly here, amici do not suggest that the government is affirmatively required to provide women with information regarding their post-pregnancy reproductive options. But once the government decides to fund a counseling relationship in which some such information is to be provided, it may not seek to skew the relationship by denying funding to those who would provide information about abortion, an idea of which it disapproves.

---

13 *Board of Education v. Pico*, 457 U.S. 853, 871 (1982) (plurality) (government may not remove books from a publicly-funded school library if it does so in order to "deny [students] access to ideas with which the [school board] disagreed").

14 *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (state may not forbid teachers from advocating overthrow of government).

15 *Widmar v. Vincent*, 454 U.S. 263, 267-70 (1980); *Healy v. James*, 408 U.S. 169 (1972).

If the government were constitutionally permitted to maintain the one-sided subsidy of speech it proposes here, it would follow that the government could subsidize only those newspapers which advocate the Administration's views on abortion or foreign policy, only those plays which do not mention abortion, only those radio programs which reflect positively on the United States, or only those libraries whose books are consistent with the government's views on matters of public controversy. In each case, the journalist, playwright, broadcaster, or librarian denied funding would be met with the explanation that the government was not prohibiting its speech, but merely declining to subsidize it. Yet in each case, the very real effect of the government's program would be to skew the marketplace of ideas to its particular political predilections. And therefore, in each case, as here, the First Amendment demands that if the government chooses to support expression, it must do so in a neutral manner.[16]

C. The Regulations Draw Content-Based Lines That are Impermissible in the Counseling Context

Even under the Second Circuit's erroneous conclusion that the regulations are viewpoint-neutral, the regulations must nonetheless be subjected to strict First Amendment scrutiny because they draw impermissible content-based lines. When the government supports a counseling program, it may not impose restrictions on the communication of information relevant to the decision being counseled upon, whether or not those restrictions are viewpoint-based. Once it decides to sup-

---

16 The Second Circuit relied on this Court's decisions providing that the government may make "a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds." *Maher v. Roe*, 432 U.S. 464, 474 (1977). But because of the First Amendment's neutrality principle, this holding cannot be simplistically transferred to the area of selective support of expression. For example, while the government certainly may implement its preference for Republican policies over Democratic ones by allocating public funds to *non-speech* programs, it may not establish a forum or provide subsidies designed to support *expression* on Republican policies while suppressing or excluding *expression* on Democratic policies.

port some post-pregnancy counseling, it may not draw content-based lines that prohibit counselors from providing relevant information on legally available options.[17]

This heightened requirement of neutrality derives from: (1) the nature of the counseling relationship; (2) the effect of providing only partial information on a woman's privacy rights; and (3) the controversial nature of the subject matter.

1. The Character of the Counseling Relationship Heightens the Need for Neutrality

The counseling relationship demands neutrality because of its extremely influential, and indeed potentially coercive, character. A counseling relationship is by definition a relation of dependence; the counselee relies upon the counselor for

17 The extent of neutrality that the First Amendment requires where the government chooses to fund or support speech varies according to the particular context. While *viewpoint* neutrality is always required absent a compelling interest, in some subsidy contexts a greater degree of neutrality is required. In traditional public forums (*Mosley*) and in subsidization of the press (*Ragland*), for example, the First Amendment demands strict *content* neutrality. *See also Bullfrog Films, Inc. v. Wick*, 847 F.2d 502 (9th Cir. 1988) (striking down as impermissibly content-based federal regulations basing films' eligibility for tax benefits on their political content).

Where the government supports speech in the public university, *Widmar v. Vincent*, 454 U.S. at 267 n.5; *Keyishian*, 385 U.S. at 603, and where the government chooses to subsidize speech by "expressly dedicat[ing a particular forum] to speech activities," it may draw some content-based lines, but other content lines are impermissible. *United States v. Kokinda*, 58 U.S.L.W. 5013, 5015 (U.S. June 27, 1990) (plurality); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983); *Cornelius*, 473 U.S. at 800-03 (plurality). Thus, a limited public forum may be created "for discussion of certain subjects," but within the forum, no further content-based lines are permissible absent a compelling interest. *Perry Education Assn.*, 460 U.S. at 46 n.7. Similarly, a state may generally decide which subjects will be taught in state schools, but may not forbid its teachers from mentioning particular theories, ideas, or subjects. *Keyishian*, 385 U.S. at 601-03; *Epperson v. Arkansas*, 393 U.S. 97, 115-16 (1968) (Stewart, J., concurring in the result); *cf. Tinker v. Des Moines Community School District*, 393 U.S. 503, 511 (1969) ("students may not be regarded as closed-circuit recipients of only that which the state chooses to communicate"); *see also* Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 Tex. L. Rev. 863, 876-78 (1979).

guidance about her options. In recognition of this fact, medical ethics and the doctrine of informed consent require medical counselors to provide their patients with full information on the available options.[18] This recognition is by no means limited to the abortion context, but underlies all ethical norms governing counseling, whether medical, legal, academic, or psychological.[19] Moreover, the counselee is essentially a " 'captive audience,' " thus increasing the danger of improper intrusion and influence. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (*quoting Public Utilities Commission v. Pollack*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting)).[20]

Thus, it is one thing for the government to express its opposition to abortion through political speeches. But it is another matter entirely to set up a one-on-one counseling relationship under the neutral rubric of "family planning," and then use that relationship to steer women, through the suppression of full information, to a particular government-desired outcome. The counseling context presents a substantial risk of impermissible influence, and therefore makes government neutrality all the more crucial. *Cf. Zauderer v.*

18 Medical ethics require physicians to provide full, unbiased counseling and referral about all available medical alternatives, whether or not the physician can provide them herself. Affidavit of Sammons ¶ 3 (JA 261-62); Declaration of Morley ¶¶ 18, 19 (JA 229-30); Declaration of Katz ¶ 9-11 (JA 207-09). Legal obligations in most states similarly mandate the provision of complete information. *See, e.g.*, Affidavit of Randolph ¶ 3 (JA 241); Affidavit of Gesche ¶ 15 (JA 15). This Court recently recognized the significance of informed consent in our common law, and its intimate relationship to constitutional freedoms. *Cruzan v. Director, Missouri Dept. of Health*, 58 U.S.L.W. 4916, 4920 (U.S. June 25, 1990).

19 *See, e.g.*, Rules 1.4, 2.1, Model Rules of Professional Conduct (1983) (requiring lawyer to provide client with sufficiently complete information to permit client to make informed decision on his or her options).

20 *See* Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 Tex. L. Rev. at 885 (explaining Court's decisions concerning First Amendment rights in public schools as predicated on "a constitutional policy limiting the state's power to communicate to a captive audience"); *id.* at 902 ("captive audience" considerations central to determining constitutionality of government expression).

Office of Disciplinary Counsel, 471 U.S. 626, 641-42 (1985) (recognizing potentially "coercive force" of one-to-one communication with attorney).

The Title X counseling relationship is especially conducive to coercion because the program is designed to reach indigent women.[21] Such women are not likely to have the means to go elsewhere. Affidavit of Coombs at ¶ 11 (JA 145). Even if they technically could afford to go elsewhere in the absence of a federally-funded program, they are likely to rely on the government's subsidized program in the interests of conserving their limited resources. Thus, the government has not only chosen an especially influential mechanism to promote its political preference for childbirth, but it has chosen to apply it to those least likely to have access to alternative sources of information. *Massachusetts*, 899 F.2d at 73 ("Given the educational and social handicaps of the women who depend upon Title X clinics, they may not learn much about the 'pro/anti abortion' considerations elsewhere; and in any event, they are likely to attach special importance to what a doctor tells them at a family planning clinic.").[22]

The nature of the Title X counseling relationship has particular relevance for the First Amendment inquiry because it directly and intimately threatens a woman's freedom to make one of the most important life and health decisions she will ever face. One of the principal aims of the First Amendment is to ensure that individuals are able to choose their own des-

21 Eighty percent or more of the patients at Title X clinics have incomes below 150 percent of the poverty line. Forrest, *Delivery of Family Planning Services in the United States*, 20 Fam. Plan. Persp. 88, 92 (1988); Declaration of Henshaw at ¶ 18 (JA 194); Affidavit of Gesche at ¶ 6 (JA 171); Affidavit of Coombs at ¶¶ 10-11 (JA 142-45); Affidavit of Drisgula at ¶ 7 (JA 150); Declaration of Fink at ¶ 3 (JA 160); Affidavit of Murray at ¶ 6 (JA 235); Affidavit of Randolph at ¶ 7 (JA 243); Declaration of Rust at ¶ 5 (JA 249-50).

22 The regulations harm not only those with no resources, but also those who pay for their Title X services. As the First Circuit recognized, "because most Title X clients pay a portion of the cost of the services (based on a sliding scale), the client's ability to go elsewhere has been significantly diminished because she has already paid what she could afford to the Title X clinic." *Massachusetts*, 899 F.2d at 70.

tinies free of the government's ideological intrusion.[23] The Title X program strikes at the core of that freedom.

The requirement of government neutrality here would apply in any counseling context, and does not depend upon the fact that the decision whether to have an abortion is itself constitutionally protected, although that fact certainly buttresses the requirement. *See* Section I.C.2, *infra*. The First Amendment would be infringed by any state-sponsored counseling program designed to provide information only about alternatives the government politically supports, while suppressing information about other legal options of which the government disapproves. Thus, the government could not bar federally-funded legal services lawyers from telling their clients about the option of divorce or providing referrals for divorce because the Administration disapproves of it.[24] Nor would the First Amendment permit a public university to establish a career counseling program in which counselors were required to provide information about careers in business, but forbidden from offering information about jobs in

23 *See West Virginia State Board of Education v. Barnette*, 319 U.S. at 642 (striking down compulsory flag salute statute to protect "the sphere of intellect and spirit which it is the purpose of the First Amendment to reserve from all official control"); *Police Department of Chicago v. Mosley*, 408 U.S. at 96 (First Amendment designed "to assure self-fulfillment for each individual"); *see also* Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591 (1982) (protecting "self-realization" is central purpose of First Amendment); T. Emerson, *The System of Freedom of Expression* 6 (1970) (First Amendment safeguards "individual self-fulfillment"); Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 Iowa L. Rev. 1, 3 (1976) ("[T]he values supported or functions performed by protected speech result from that speech being a manifestation of individual freedom and choice"); Scanlon, *A Theory of Freedom of Expression* 1 Phil. & Pub. Aff. 204 (1972) (First Amendment protects "autonomy").

24 Legal services attorneys are forbidden from providing certain types of legal services, 42 U.S.C. § 2996f(b), just as Title X clinics are forbidden from providing abortions. 42 U.S.C. § 300a-6. But the analogy here would be a provision barring legal services lawyers from providing basic information and referrals about those services that they could not themselves provide.

consumer protection. *See, e.g., Searcey v. Crim*, 815 F.2d 1389 (11th Cir. 1987).

The First Amendment requires neutrality in government subsidies in part because government attempts to instill orthodoxy in its citizens are anathema to a free society:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.

Barnette, 319 U.S. at 642; *see also Keyishian v. Board of Regents*, 385 U.S. at 603 (First Amendment "does not tolerate laws that cast a pall of orthodoxy over the [publicly funded] classroom"); *Pico*, 457 U.S. at 870 (same). The mandate of neutrality seeks "to avoid the insidious evils of government propaganda favoring particular points of view." *FCC v. League of Women Voters*, 468 U.S. 364, 409 (1983) (Stevens, J., dissenting).[25]

If upheld, the Title X restrictions would institute a propaganda outlet in one of the most intimate and influential contexts a citizen ever encounters—medical counseling. Indeed, it would give new and ominous meaning to the word "counseling." The government would be free to maintain a program that "counsels" millions of poor women by providing them with skewed information about their lawful reproductive choices. This is a particularly insidious form of propaganda, because it works by keeping women ignorant of their full

25 Recognizing these preeminent First Amendment values, Congress in creating the Corporation for Public Broadcasting sought to protect publicly funded broadcasting stations from all "governmental interference and control." *FCC v. League of Women Voters*, 468 U.S. at 369; *see also id.* at 386-87. Both the Senate and House Reports stated in the strongest possible terms that although government funding of non-commercial broadcasting was necessary, it must be structured so that political officials would have no control or interference over the content of programming. *See FCC v. League of Women Voters*, 468 U.S. at 386 n.17 (quoting from Senate and House Reports). These legislative decisions reflect a deep consensus in our society that government propaganda poses a grave threat to the free marketplace of ideas.

options, telling them only about the government's preferred choice.[26]

Thus, because the government has decided to support some post-pregnancy counseling and referral, the First Amendment bars it from suppressing the provision of information on abortion, information clearly relevant to the decision at hand.

2. The Effect On the Counselee's Privacy Rights of Providing One-Sided Counseling Also Supports a Mandate of Neutrality

The fact that the decision at issue—whether or not to bear a child—is itself independently constitutionally protected underscores the necessity for full information. The privacy right to abortion is in large part a decisional right, and therefore the First Amendment's guarantees are augmented here by the Title X patient's right to privacy.[27] The Constitution protects a woman's right "to decide to have an abortion and to effectuate that decision 'free of interference by the state.' " *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 429-30 (1983). A decision whether or not to terminate a pregnancy, like any decision concerning a medical procedure, is not free unless founded on full and unbiased information. *See supra* note 18. Therefore, the government may not seek to skew a pregnant woman's choice by requiring "the delivery of information 'designed to influence

26 Because patients' First Amendment rights are directly violated by a government program designed to steer them, through skewed counseling, away from the option of abortion, these regulations would be unconstitutional even if the government itself were operating the Title X program. The fact that the government has chosen to fund others to do so exacerbates rather than mitigates the constitutional violation. *See* Section II, *infra*.

27 As Justice Scalia recently noted, writing for the plurality in *Employment Division v. Smith*, 58 U.S.L.W. 4433, 4436 (U.S. April 17, 1990), where First Amendment protections and other constitutional guarantees operate "in conjunction," heightened protection is warranted. *See also Wooley v. Maynard*, 430 U.S. 705 (1977) (free speech and free exercise rights); *Bigelow v. Virginia*, 421 U.S. 809 (First Amendment and privacy rights); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (First Amendment and Fourteenth Amendment rights).

the woman's informed choice between abortion or childbirth.' " *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 760 (1986) (*quoting City of Akron*, 462 U.S. at 443-44).

As the First Circuit recognized, the regulations "attempt[ ] to persuade a woman to opt for childbirth over abortion by presenting limited and biased information and by rendering the decision to abort more difficult." *Massachusetts*, 899 F.2d at 66. For this reason, the regulations independently violate women's privacy rights. *Id.* at 64-72. But this fact also has an impact on the First Amendment analysis, for it underscores the necessity for government neutrality. *Id.* at 73.

The Secretary has argued that the regulations do not implicate any privacy rights because they create no obstacles to the abortion decision, and simply fail to remove pre-existing obstacles. *See Massachusetts*, 899 F.2d at 68-69. This argument is contrary to the unrebutted record evidence, which demonstrates that the establishment of a biased and one-sided counseling relationship erects affirmative obstacles to a woman's freedom to choose, by at best delaying her obtaining of abortion counseling, and at worst inducing her to rely on the partial information.[28]

The Secretary's argument regarding the absence of obstacles might have more credence had he sought to abolish the Title X program altogether. In the absence of any federally-funded family planning program, the Secretary might well argue that there is no affirmative right to subsidized information. But the government has not decided to get out of family planning altogether. Instead, it has decided to restructure family planning so that it provides one-sided, biased information. Far from playing a neutral hands-off role, the government has decided to enter the field of providing information

28 Affidavit of Drisgula at ¶¶ 20-22, 29 (JA 154-55, 57); Declaration of Fink at ¶ 12 (JA 163-65); Affidavit of Gesche at ¶¶ 16-20 (JA 164-66); Affidavit of Gordon at ¶¶ 6-14 (JA 181-84); Declaration of Henshaw at ¶¶ 15, 21 (JA 193, 195-96); Affidavit of Joseph at ¶ 9 (JA 203-04); Declaration of Morley at ¶¶ 6, 8, 12, 13 (JA 224-27); Declaration of Rust at ¶¶ 9-10 (JA 250-52); *see also Massachusetts*, 899 F.2d at 67, 69-70.

about post-pregnancy options, and to do so in a biased way that suppresses information and creates obstacles to a woman's right to decide whether to terminate her pregnancy.

Before the Second Circuit, the Secretary admitted that a system of subsidies that leads to the provision of "misleading or inaccurate information concerning abortion" would constitute an unconstitutional "obstacle." Appellee's Brief in *New York v. Sullivan* (2d Cir.) at 64 n.51. Yet in the context of medical counseling, where non-directive counseling about all available options is necessary to a patient's free choice, partial and one-sided information has the same effect as "misleading or inaccurate information." *Massachusetts*, 899 F.2d at 69-70.

Accordingly, because the information that the government has undertaken to suppress has a direct impact on women's constitutional right to decide whether to have an abortion, the First Amendment's mandate of neutrality is doubly mandated.

3. The Controversial Nature of the Topic of Abortion Underscores the Necessity for Neutrality

The political controversy surrounding the particular idea suppressed by the Title X regulations—that abortion is an option—also bolsters the need for neutrality. The Court has frequently acknowledged that the specter of censorship is most severe where the government seeks to regulate controversial speech, and therefore even viewpoint-neutral attempts to suppress controversial speech are unconstitutional. *FCC v. League of Women Voters*, 468 U.S. at 381 (striking down ban on editorializing by broadcasting stations receiving federal funding); *Consolidated Edison Co. v. Public Service Commn*, 447 U.S. at 533 (striking down order forbidding public utilities from using bill inserts to discuss "controversial issues of public policy"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) ("expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values' ") (*quoting Carey v. Brown*, 447 U.S. 455, 467 (1980)).

The Court's special vigilance for controversial and political speech stems in part from the First Amendment's role in protecting the democratic processes of self-government.[29] If as a society we are to make free and democratic choices about such controversial topics as abortion, the government must not be permitted to suppress information and manipulate speech about abortion through its purse strings. Indeed, if § 59.10 is constitutional, there would be nothing to stop the federal government, if it became unhappy with state legislation on the abortion issue, from subsidizing anti-abortion lobbying and not pro-abortion lobbying.

While reproductive choice is ultimately an intensely private decision, it is also undeniably the single most controversial issue in today's political climate. This fact makes it all the more important that the Court demand neutrality in government-supported expression on the topic.

II. THE REGULATIONS IMPERMISSIBLY PENALIZE GRANTEES' USE OF PRIVATE MONIES TO EXPRESS CONSTITUTIONALLY PROTECTED IDEAS

The regulations not only restrict government-funded expression, but also burden grantees' freedom to speak with private and non-federal monies. They do this in two ways: (1) by defining the "Title X project funds" restricted by the regulations to include non-federal monies; and (2) by imposing an onerous physical separation requirement on those clinics which seek to continue to counsel about abortions.

A. The Restrictions By Their Terms Apply to Non-Federal Funds

By expanding the definition of "Title X project funds," the regulations restrict all speech paid for with "grant funds, grant-related income or matching funds." 42 C.F.R. § 59.2.

29 "The principle of the freedom of speech springs from the necessities of self government . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage." A. Meiklejohn, *Political Freedom* 27 (1960).

The Secretary admits that the regulations apply to all private "funds generated by the Title X project through, for example, patient charges or reimbursement from collateral sources." Brief for the Respondent on Petitions for Writ of Certiorari at 6 n.6. Thus, grant recipients are not free even to use their private monies to fund any abortion-related dialogue in the Title X project, and are compelled to use private funds to spread the government's ideological message. As the First Circuit stated, "The practical effect of the regulations is to restrict significantly the ability of the recipient organization to engage in the forbidden counseling even on its own time with its own money." *Massachusetts*, 899 F.2d at 74.[30]

Accordingly, the regulations do not merely limit how federal funds will be spent, but also impose affirmative conditions on grantees' use of funds generated privately and through the states. Such a restriction on a grant recipient's ability to speak freely with its own resources is an unconstitutional penalty. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *see also Rutan v. Republican Party of Illinois*, 58 U.S.L.W. 4872, 4875 (June 21, 1990); *Elrod v. Burns*, 427 U.S. 347, 355 (1976) (plurality); *id.* at 375 (Stewart, J., concurring in judgment).

In their extension to speech with non-federal funds, these regulations are analogous to the statute struck down in *FCC v. League of Women Voters*, 468 U.S. 364, which prohibited broadcasting stations receiving federal funds from endorsing candidates or "editorializing," even with their own monies.

30 While Title X grantees are required by the Act to contribute ten percent (10%) of total expenses in matching funds, *see* 42 U.S.C. § 300a-4, "in fact, 'matching funds' comprise a much larger portion of the budget than the required 10%." *Massachusetts*, 899 F.2d at 55-56; *see also Valley Family Planning v. North Dakota*, 661 F.2d 99, 100 (8th Cir. 1981) (Title X funds only 33% of budget). Indeed, the Secretary conceded at oral argument before the First Circuit "that federal government funds account for about 50% of the money received by Title X clinics." *Massachusetts*, 899 F.2d at 56. The remainder is money "provided through state payments such as Medicaid, fees paid by the clients (based on a sliding scale) and private funds." *Id.*

The Court held this provision unconstitutional because it extended beyond a restriction on government funds to penalize private funds, and therefore chilled and censored protected speech. *Id.* at 400. The regulations here are even more constitutionally offensive, because they dictate not only what may *not* be said, but also what Title X providers *must* say with non-federal funds. *Wooley v. Maynard*, 430 U.S. 705 (1977) (unconstitutional to compel citizens to bear license plate with government slogan); *Barnette*, 319 U.S. at 633-34 (compulsory flag salutes unconstitutional).

B. The Physical Separation Requirement is Facially Unconstitutional Because It Burdens Speech With Private Funds

The Title X regulations require grantees to demonstrate physical separation of the Title X program from non-Title X activities, even if a grantee can demonstrate through financial separation that no federal funds are being spent for non-Title X activities. 42 C.F.R. § 59.9. This requirement is facially unconstitutional because it impermissibly burdens Title X grantees' privately-funded speech.

This Court has held that the government may impose a content-and viewpoint-neutral restriction on federally funded expression if it permits the grantee, through an affiliate, to spend its private monies on unrestricted expression. *Regan*, 461 U.S. at 544 n.6. In order to ensure unrestricted expression, however, separation requirements between the grantee and its affiliate are permissible solely to "show that tax-deductible contributions are not used to pay for [the restricted activity]." *Id.* This is because the government's interest in restricting use of its own funds "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama*, 377 U.S. 288, 307 (1964). Anything beyond a requirement of financial separation, therefore, is facially unconstitutional.

In *Regan*, for example, the only requirements were that the affiliate be separately incorporated and keep records adequate to show financial separation. 461 U.S. at 544 n.6.[31] Similarly, in *FCC v. League of Women Voters*, the Court suggested in dicta that the editorializing ban might have survived if financial separation were an option, but made clear that *physical* separation should not be required. 468 U.S. at 400 (under Court's proposed separation, station would be able to "use the station's *facilities* to editorialize," so long as it did not use earmarked federal funds).

More recently, the Court struck down a separation requirement because it placed an undue burden on a corporation's private expenditures on expression. In *FEC v. Massachusetts Citizens for Life*, 107 S. Ct. 616, 625-27 (1986), the Court found separation requirements imposed on an ideological non-profit corporation's campaign spending so burdensome as to inhibit independent campaign expenditures, and invalidated them under the First Amendment.

The regulations on their face demand more than financial separation, and therefore are unconstitutional. They require physical separation as well, and would preclude Title X projects from establishing affiliates that could share Title X premises at a pro-rated rent and receive referrals from the Title X project. The physical separation requirement, particularly when coupled with the expanded definition of Title X funds to cover private and state as well as federal monies, goes far beyond that which is necessary to ensure that federal

31 Moreover, *Regan* involved not a direct subsidy or tax exemption for an organization, but a restriction on the use of funds that were tax deductible by the organization's donors. Tax deductible funds are distinguishable from direct subsidies or exemptions on very practical grounds. Because the extent of any deduction will vary with each individual donor's tax bracket and financial circumstances, it would be practically impossible for the donee organization to ascertain how much of each donation was federally funded through the tax deduction, and how much was comprised of private funds. Thus, even if heightened scrutiny had been applied in *Regan*, the restrictions may well have survived; one of the narrowest means by which the government could prevent the use of deductible monies for lobbying was to restrict the use of the deductible donation in its entirety. No such practical difficulty is posed by a direct subsidy, the use of which can be limited without restricting any private funds. *See Massachusetts*, 899 F.2d at 74.

monies are not spent for a purpose outside the scope of its funded program. *See* Section III, *infra*.

This Court has repeatedly stated that the First Amendment will not "allow the government to 'produce a result which [it] could not command directly.' " *Perry v. Sindermann*, 408 U.S. at 597 (*quoting Speiser v. Randall*, 357 U.S. at 526). Here, the government could not directly prohibit the discussion of abortion as a method of family planning nor require private citizens to deliver the government's chosen message; it likewise cannot impose such requirements on Title X providers as a condition of receiving federal funds. Because the regulations impermissibly place Title X recipients in the position of choosing between exercising their free speech rights and foregoing federal funding, or censoring their speech and obtaining the government benefit, they violate the First Amendment.[32]

III. THE TITLE X REGULATIONS ARE NOT NARROWLY TAILORED TO SERVE A COMPELLING STATE INTEREST

Because the regulations impermissibly discriminate on the basis of the viewpoint and content of speech, and impose restrictive conditions on speech with private resources, they can be justified only if they are narrowly tailored to achieve a compelling state interest. *Ragland*, 481 U.S. at 231; *Barnette*, 319 U.S. at 633-34. The Secretary has not even claimed that the government has a compelling interest here, and has simply argued for a more lenient standard of review.

---

32 Indeed, since the government cannot prevent the exercise of free speech rights by its direct employees acting on the government's time and money, *see Rankin v. McPherson*, 483 U.S. 378 (1987) (state may not discharge employee for exercise of free speech during work hours), it similarly may not impose restrictions on what non-federal employees receiving federal monies may express with other resources. As the First Circuit stated, it "would seem to follow *a fortiori*" from the government employee speech cases "[t]hat the government cannot restrict privately financed, unusually important, speech activities simply to achieve an ironclad guarantee that its funds are not 'improperly spent.' " *Massachusetts*, 899 F.2d at 74.

The only interest the government has asserted is "making certain its own money is not spent for a purpose outside the scope of its funded program," *i.e.*, "preventive family planning." *Massachusetts*, 899 F.2d at 74; Sec. Supp. Br., *supra* at 1. But as with most content- or viewpoint-based regulations, a less restrictive alternative is available in a neutral and more narrowly tailored prohibition. The Secretary could have provided for *no* counseling at all regarding post-pregnancy options. Alternatively, the regulations could have permitted the counselor to state that the options are abortion and childbirth, to inform the woman that no post-pregnancy counseling can be done in the Title X program, and to refer her to a neutral list of clinics that counsel and provide such services. And the regulations could have forbidden all advocacy, not just advocacy in favor of abortion.[33]

Similarly, a more narrowly tailored alternative is available with respect to the government's interest in ensuring that federal funds are not spent for inappropriate purposes. The Secretary could have limited the regulations' restrictions to the federal monies appropriated, rather than including in their ambit funds from private and state sources. And the Secretary could have required a demonstration of financial separation, without superimposing the additional requirement of physical separation.[34]

Thus, the Secretary has asserted no compelling state interest whatsoever, and the only interest he has asserted can be fully satisfied through a neutral and less restrictive alternative.

---

33 In other contexts, the government might have a compelling interest in preserving the health of its citizens that might justify a non-neutral counseling program, such as an anti-alcoholism program. Even there, however, the government would have no compelling interest in *forbidding* its counselors from providing relevant information counter to its particular point of view, such as studies that demonstrate that drinking in moderation is not harmful.

34 As the First Circuit stated, "The government could easily withdraw the 'physically separate' facilities requirement, make the 'counseling' regulations less slanted, and provide various forms of 'bookkeeping' rules. These 'less restrictive alternatives' would be as likely to prove effective here as in *League of Women Voters*." *Massachusetts*, 899 F.2d at 74.

CONCLUSION

The current Administration clearly feels very strongly about the issue of abortion. It is free to make those views known through all manner of government speech, and it has done so. But the First Amendment limits its ability to intrude on indigent women's most personal decisions through a one-sided counseling program. The Administration is not free to manipulate its support of a "family planning" counseling program in a manner designed to suppress information about abortion and steer unsuspecting women toward its political preferences. "One's right to life, liberty, . . . free speech, . . . and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." *Barnette*, 319 U.S. at 638. For all the above reasons, the decision of the court of appeals should be reversed, and the regulations should be invalidated as unconstitutional.

Respectfully submitted,

DAVID D. COLE
(*Counsel of Record*)
Center for Constitutional Rights
666 Broadway—7th Floor
New York, New York 10012
(212) 614-6432

JAMES M. SHANNON
Attorney General of Massachusetts

RUTH A. BOURQUIN
Assistant Attorney General
One Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-2200

APPENDIX

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH (ADL), for over seventy-seven years, has pursued the objective set out in its Charter "to secure justice and fair treatment to all citizens alike." In order to further this objective, ADL has fought steadfastly to remove barriers which have prevented individuals from fully enjoying the rights guaranteed by the Constitution, including free speech, freedom of religion and equal protection.

AMERICANS FOR DEMOCRATIC ACTION (ADA), a liberal, independent political organization, is a national organization of civil rights and feminist leaders, academicians, business people, trade unionists, grassroots activists, elected officials, church leaders, professionals, Members of Congress and many others. ADA is dedicated to the achievement of freedom, equality of opportunity, economic security and peace for all people through education and political action.

AMERICAN JEWISH CONGRESS is an organization of American Jews founded in 1918 to protect the civil, political and economic rights of American Jews. It believes that government may not interfere with a woman's right to choose abortion.

THE AMERICAN VETERANS COMMITTEE, INC. (AVC), founded in 1943, is a national organization of veterans who served honorably in the Armed Forces of the United States in World War I, World War II, Korean War, or Vietnam War. AVC has filed *amicus* briefs in many court cases expressing AVC's strong belief that discrimination based on race, color, religion, sex, or national origin is detrimental to our nation. AVC believes that the U.S. Constitution entitles a pregnant woman, in light of her unique burden of pregnancy, to determine whether to terminate her pregnancy, and that the regulations under Title X of the Public Health Service Act involved in this case violate both that constitutional right and the right of medical personnel under the First Amendment to provide information about such termination to their patients.

ARTICLE 19, INTERNATIONAL CENTRE ON CENSORSHIP, an international human rights organization based in London, was established in 1986 to help promote and protect the rights proclaimed in Article 19 of the Universal Declaration of Human Rights. Those rights include the right to "seek, receive and impart information and ideas of all kinds, regardless of the frontiers". That clause, part of customary international law and thus binding on all governments, compels respect for the right of women to seek and receive even-handed information about abortion as well as for the right of physicians and others to impart such information. It is Article 19's position that the US Government, by denying federal aid to agencies that provide abortion information, is limiting those rights impermissibly.

BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, incorporated in 1972, is a non-profit educational organization devoted to women and health. We provide information, resources and technical assistance to the media, health care workers, policy makers, students, women's organizations in the U.S. as well as in other countries, and individuals with particular concerns. We serve about 10,000 persons every year. We are deeply concerned about this case because high quality, accessible family planning and abortion services are crucial to the health and well-being of women and their families.

BUSINESS AND PROFESSIONAL WOMEN/USA was founded in 1919 to improve the status of women in the workforce and is dedicated to promoting full participation, equity, and economic self-sufficiency for working women through active involvement of its 120,000 members in 3100 local chapters, joined together by 53 state federations and the national headquarters in Washington, D.C.

CATHOLICS FOR A FREE CHOICE is an independent national membership organization established in 1974. One of CFFC's objectives is to protect the legal right of all women and girls to act as moral agents in decisions related to sexual-

ity and reproductive health care without coercive legal or quasi-legal interference by religious institutions. As Catholics, CFFC members support policies of strict separation of church and state based not only on the U.S. Constitution but also on the Roman Catholic Declaration on Religious Liberty (Vatican II Dignitatis humanae, 7 December 1965) which declares: ". . . the civil authority must see to it that the equality of the citizens before the law, which is itself an element of the common good of society, is never violated either openly or covertly for religious reasons and that there is no discrimination among its citizens."

CATHOLICS FOR CHOICE OF ST. LOUIS support the right of poor and marginalized women to be recognized as mature human beings entitled to be made aware of all of the legal, medically possible, options available to them when faced with problem pregnancies. We deplore any attempt to raise the continued existence of every fertilized egg to a value higher than a pregnant woman's right to exercise her specifically human faculties of control over her life.

THE CENTER FOR CONSTITUTIONAL RIGHTS is a not-for-profit public interest law organization dedicated to providing legal support for progressive movements. It was founded in 1966 by lawyers active in the civil rights movement. It has litigated several cases concerning the effect on free speech of restrictions on government funding, including *Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53 (1st Cir. 1990) (*en banc*), *petition for cert. filed*, No. 89-1929 (June 11, 1990), which also challenges the regulations at issue here.

THE CENTER FOR WOMEN POLICY STUDIES (CWPS), founded in 1971, was the first national policy research and advocacy institute focused exclusively on issues of women's social and economic rights. The Center's current programs include the National Resource Center on Women and AIDS, the first national effort focused exclusively on women, particularly low income women and women of color; a key concern

is the potential abrogation of women's reproductive rights in the name of protecting public health. CWPS also is conducting the second stage—policy implementation and public education—of the Reproductive Laws for the 1990's Project. Finally, our Young Women's Project seeks to bring women in their twenties into the policy process and will address issues of reproductive choice from their perspectives.

COALITION FOR CHOICE OF VALPARAISO SCHOOL OF LAW, subscribes to the general statement of interest of *amici curiae*, *supra*, at p.1.

THE COMMONWEALTH OF MASSACHUSETTS was a plaintiff in the action that gave rise to the decision in *Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53 (1st Cir. 1990) (*en banc*), *petition for cert. filed*, No. 89-1929 (June 11, 1990), in which the regulations at issue in this case were enjoined nationwide. The Commonwealth has an interest in protecting its citizens from the devastating consequences that would result from implementation of the regulations.

D.C. RAPE CRISIS CENTER is a nonprofit organization providing counseling and advocacy to sexual assault survivors and community education on related issues to the Washington metropolitan area. We are a grassroots organization with a strong concern for all issues which affect women and children in our society; we focus our energy on those women and children traditionally disenfranchised due to poverty, racism, or other forms of oppression. The Center believes that all women should have access to safe and legal abortions and that all clinics, regardless of whether they receive Title X funding, should be free to provide accurate and comprehensive information on abortion to clients. To interfere with such a right concerns the Center because such a prohibition would not only lessen the availability of information on abortions, but would also disproportionately affect low-income women who rely solely on clinics funded by Title X for their medical services.

THE DOMESTIC VIOLENCE CENTER OF CHESTER COUNTY (Pennsylvania) is an organization which provides a hotline, safe housing, and comprehensive counseling to battered women. A great many of the women served are single parents with low incomes. These women must struggle to procure fair access to health care services. We strongly oppose inequitable treatment for low-income women denied fair access to medical services including abortion.

FEDERATION OF RECONSTRUCTIONIST CONGREGATIONS AND HAVUROT. Although the Jewish tradition regards children as a blessing, the tradition permits the abortion of an unborn child to safeguard the life and physical and mental health of the mother. The rabbis did not take a consistent stand on the question of whether the fetus resembles "a person." They did not think it possible to arrive at a final theoretical answer to the question of abortion, for that would mean nothing less than to be able to define convincingly what it means to be human. We recognize that abortion is a tragic choice. Any prospective parent must make an agonizing decision between competing claims—the fetus, health, the need to support oneself and one's family, the need for time for a marriage to stabilize, responsibility for other children and the like. Some of us consider abortion to be immoral except under the most extraordinary circumstances. Yet we sympathize with the anguish of those who must make the decision to abort or not to abort.

FLORIDA ASSOCIATION FOR WOMEN LAWYERS, DADE CHAPTER, INC. (FAWL-Dade) is a Florida corporation not for profit. Its purposes, as stated in the Articles of Incorporation, include improvement of the administration of justice, dissemination "to the public, particularly to women, information on legal rights and related sources of assistance" and promotion of "public awareness and elimination of abuses that diminish the integrity of the individual and family unit". FAWL-Dade is particularly concerned with the negative impact of the challenged regulations on these goals. We believe the regulations prevent the dissemination to women of

vital information about their legal rights and about other sources of assistance. We also believe the regulations diminish the integrity of women as individuals and the integrity of the family unit.

THE FUND FOR FREE EXPRESSION was formed in 1975 by a group of authors, publishers, journalists and interested individuals to champion Article 19 of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on December 10, 1948. Article 19 guarantees "the right of people the world over to express themselves freely without fear of retribution, the right to hold opinions without interference and the right to seek, receive and impart information through any media regardless of frontiers."

THE GAY MEN'S HEALTH CRISIS (GMHC), based in New York City, is the nation's oldest and largest community-based AIDS service, education and advocacy organization. As of May, 1990, approximately 7% of GMHC's 2830 active clients were women. The majority of our female clients are women of color. GMHC is concerned that our female clients and women in general affected by the HIV epidemic be able to make their own medical decisions and that one option that must be available is a safe and legal abortion regardless of a woman's financial status. All medical options must be presented to them in counseling, including the option of a safe and legal abortion. This counseling must be non-judgmental and objective.

HADASSAH, the Women's Zionist Organization of America representing over 385,000 members, supports the principle of individual freedom as guaranteed by the Bill of Rights to the Constitution of the United States, and opposes any federal, state or local regulations that diminish that guarantee. In this respect, Hadassah regards freedom of choice as a matter of privacy of the individual to be determined by each woman in accordance with her religious, moral and ethical values.

HAWAII WOMEN LAWYERS (HWL) was formed in 1976 to further the goals of women attorneys in Hawaii, and improve the status of all women. HWL supports the right of privacy and autonomy recognized in *Roe* v. *Wade* and *Griswold* v. *Connecticut*, and opposes any efforts to intrude upon rights of safe and legal access to family planning and abortion services.

HOLLYWOOD WOMEN'S POLITICAL COMMITTEE (HWPC) is comprised of politically active women from film, television, and the arts and is dedicated to supporting issues, candidates, and legislation which promote peace, equality, freedom of choice, and the conservation of the environment. Faced with the *Webster* decision in 1989, the HWPC and its sister foundation, the Hollywood Policy Center (HPC), took a lead role in organizing the entertainment community's contribution to securing the right to choice. Working in support of the grassroots activities of other national organizations, the HPWC put together a one-year effort to link a pro-choice agenda to public opinion through the use of media. Protection of the right to reproductive freedom contained in the federal Constitution, which, by definition, must include access to information concerning abortion services or referral, is one of the most significant legal issues facing women in Southern California, as well as the rest of the country. As such, it is clearly within the priority concerns of the Hollywood Women's Political Committee.

INSTITUTE OF WOMEN TODAY, subscribes to the general statement of interest of *amici curiae*, *supra*, at p.1.

THE JEWISH LABOR COMMITTEE (JLC) is the liaison organization that acts as the link between the organized Jewish community and the American trade union movement. It is active in defense of trade union, civil and human rights, and works to support diverse public policy issues of concern to organized labor and American Jewry. JLC has held a long-standing concern for individual rights and religious liberty and has steadfastly asserted that the constitutional right to

free speech is essential to the preservation of American democracy. JLC therefore opposes governmental coercion or constraint of information or full medical advice, including the option of abortion, to a person seeking such help.

JOURNAL OF WOMEN'S HISTORY, subscribes to the general statement of interest of *amici curiae*, *supra*, p.1.

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., founded in 1973, is the nation's oldest and largest national legal advocacy organization working in furtherance of the rights of lesbians and gay men. As an organization representing the lesbian and gay community's belief in the constitutional right to liberty and bodily autonomy, Lambda strongly supports the position that women in our society are constitutionally entitled to make their own decisions about whether to choose abortion. Inherent in this right is the right to receive all relevant information, including the option of abortion, in order to make an informed health care choice.

LAWYERS FOR REPRODUCTIVE RIGHTS is a Pennsylvania organization founded to educate fellow lawyers and the public on legal issues of reproductive rights and to work to ensure that all reproductive options are available. The organization represents approximately 800 lawyers in the greater Philadelphia metropolitan area.

LEARNING ALLIANCE, operating throughout the New York Metropolitan Area, is an independent non-profit education and social action organization. Through workshops, classes, conferences, work/study groups, celebrations and other creative formats, we seek to share information, skills, tools and other resources and move people to action on a wide range of community and social concerns including homelessness and housing justice, ecological concerns, women's issues, community health care, and neighborhood economics. We have a commitment to insure participation of all people. The Learning Alliance Reproductive Rights Leadership Training Project is designed to encourage local commu-

nity groups and reproductive rights activists and educators to cooperate towards the common goal of a better informed and more involved public with special attention paid to low income women and women of color who do not have access to the skills necessary for them to take effective action.

NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC. (NASW), a nonprofit professional association with over 120,000 members, is the largest association of social workers in the United States. Founded in 1955, NASW has chapters in every state as well as the Virgin Islands, Puerto Rico, and Europe. NASW is devoted to promoting the quality and effectiveness of social work practice, to advancing the knowledge base of the social work profession and to improving the quality of life through the utilization of social work knowledge and skill. NASW is deeply committed to the principle of self-determination and to the protection of individual rights and personal privacy.

NATIONAL COALITION OF AMERICAN NUNS, subscribes to the general statement of interest of *amici curiae*, *supra*, p.1.

NATIONAL CONFERENCE OF BLACK LAWYERS is a non-profit legal association of lawyers and legal workers organized in 1968. NCBL performs a broad range of legal support work around issues which impact the poor and communities of color. NCBL has a special interest in cases involving reproductive rights because people of color and the poor are disproportionately at higher risk if reproductive rights are denied.

THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE is a not-for-profit organization dedicated to the preservation and extension of civil liberties and civil rights. Founded in 1951, it has brought numerous actions in the federal courts to vindicate constitutional rights. Through its educational work, it likewise has sought to preserve our liberties. From time to time the National Emergency Civil Liberties

Committee submits *amicus curiae* briefs to the courts when it believes issues of particular import to civil liberties are at stake.

NATIONAL GAY RIGHTS ADVOCATES (NGRA) is a non-profit, public-interest law firm dedicated to the protection and expansion of the rights of lesbians, gay men and persons with HIV infection. NGRA engages in litigation and community education throughout the United States on behalf of its members, a substantial percentage of whom are women. An integral facet of NGRA's mission is the protection of freedom of expression and the right to privacy, including the preservation of unimpaired access to information allowing individuals to make informed decisions regarding their own lives and their own bodies. *Amicus*' interest herein is to ensure that all women are guaranteed full access to information regarding their established right to terminate a pregnancy and further, to ensure that the critical right to freedom of speech is not eroded.

NEW YORK WOMEN IN CRIMINAL JUSTICE is an organization of women whose members include police, probation and correction officers; judges, attorneys, and social workers; others who work in the criminal justice system; inmates and ex-offenders. Our main concerns are that offenders who go through the system not come out worse than when they went in, and that as many offenders as possible be diverted from the system. We also strongly support the right of a woman to choose abortion, knowing that the offspring of women in prison become the dysfunctional children in school and often the criminals of the future. The right to abortion should not be restricted to only women who can afford abortions (whether or not they remain legal); the right to choose should be available to all women, most especially those who understand the heavy burden that would be imposed upon both the children and the women in and just out of prison.

OAKHURST PRESBYTERIAN CHURCH (Georgia) and denomination support the right of all women to have access

to safe and legal abortions. We affirm that the final decision must be made between a woman and God.

THE ORGANIZATION FOR BLACK STRUGGLE is a non-profit grass-roots community organization whose primary objective is to organize and empower poor and disenfranchised people to fight for their human and civil rights, to improve their quality of life, and to make fundamental changes in the society to insure justice, equality and peace for all its citizens. For over a decade, we have been in the forefront of the struggle for economic, social and political empowerment of the African American community in St. Louis. We believe that women must receive complete, accurate and unbiased information about their health care and reproductive options in order to make informed decisions about their lives. The rights of women should not be waived simply because of gender or income. We are relying on the courts to unconditionally uphold these rights.

P.E.N. AMERICAN ("PEN") CENTER is a nonpartisan, nonprofit organization of over 2,400 writers and an affiliate of International P.E.N, a worldwide association of poets, playwrights, essayists, editors and novelists. PEN works for the unhampered transmission of thought within every nation and between all nations and is opposed to all forms of suppression of freedom of expression in the countries and communities to which its members belong.

POPULATION COMMUNICATION is an international, non-profit organization which communicates population and environmental messages to world leaders through books, reports, mailings, news releases, and motion pictures. During the last twelve years, it has obtained the support of forty-eight world leaders for a Statement of Population Stabilization.

THE POPULATION COUNCIL, an international, nonprofit organization established in 1952, undertakes social and health science programs and research relevant to developing coun-

tries and conducts biomedical research to develop and improve contraceptive technology. The Council provides advice and technical assistance to governments, international agencies, and nongovernmental organizations, and it disseminates information on population issues through publications, conferences, seminars, and workshops. The First Amendment issues in *Rust* v. *Sullivan* are directly analogous to issues that affect the Council vitality under the "Mexico City" policy of the United States Agency for International Development.

POPULATION CRISIS COMMITTEE (PCC) seeks to increase public awareness, understanding and action towards the reduction of population growth rates through voluntary family planning. PCC supports privately funded projects in developing countries that provide medical training in the treatment of complications of abortion, including incomplete abortions, and in menstrual regulation procedures in countries where abortion is legal. The Title X regulations which restrict abortion counseling are virtually identical to restrictions under the "Mexico City Policy" imposed on foreign organizations receiving U.S. Government foreign aid funds. PCC believes these regulations, as applied both domestically and internationally, are unconstitutional, and, on the international level, violate the right of PCC to freedom of speech and association with respect to its funding of abortion services and abortion law reform in foreign countries.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, INC. is a regional group with 4,500 members. Among others, this membership includes people who provide abortion and other reproductive health services to women, people who counsel women about their reproductive options, and women who have sought or who may seek abortion as one of their reproductive options. The Network started in late 1988 and was incorporated in May 1989. The purposes of the Pro-Choice Network are to bring organizations and individuals together to preserve and support women's constitutional reproductive rights, to educate the general public regarding the rights, and to undertake actions to publicize the significance of these rights and threats to them. The Pro-Choice Network of Western New York recognizes that guaranteeing women the full range of reproductive choices is critical to preserving their health, their autonomy and equality. We also believe that the contested Title X regulations deny clinic workers their right to free speech, and deny patients the right to make informed decisions about a private, medical matter.

PRO-CHOICE RESOURCES is an organization committed to educating individuals on all reproductive options. We strive to provide information on reproductive health in order to encourage people to make rational, responsible decisions. We feel that the issue of abortion is a private matter. One key program of Pro-Choice Resources is an Emergency Assistance Fund for low-income women. It is through this program that we see the importance of including abortion as a viable option for women. Accurate information on this medical procedure is imperative in order for women and families to make informed decisions about their lives. We encourage you to strike down any restrictions on the use of Title X funding.

REFUSE AND RESIST! is a national organization with chapters in most major cities with memberships ranging in the several thousands. R&R! is a nonpartisan, direct action organization that exposes and rallies against art censorship, restrictions on women's reproductive rights, the sham "war on drugs" which we consider a war on Black and Latino youth, and the locking up of immigrants by the Immigration and Naturalization Service.

THE RELIGIOUS COALITION FOR ABORTION RIGHTS (RCAR) is a national coalition of 35 Protestant, Jewish, and other faith groups committed to the preservation of religious liberty as it relates to our reproductive freedom. Each denomination and faith group represented among us approaches the issue of choice from the unique perspective of its own theology with members holding widely varying viewpoints as to when abortion is morally justified. It is exactly

this plurality of beliefs which leads us to the conviction that the abortion decision must remain with the individual to be made on the basis of conscience and personal religious principles, free from government interference.

SOUTHERN STUDENTS FOR CHOICE is a Florida-chartered nonprofit corporation, incorporated in 1989 to organize students in the southeastern states to protect and advance reproductive freedom for people in the southeast, in particular for the less advantaged, such as poor people, young people, and people of color.

THE SOUTHWEST COALITION FOR CHOICE is a coalition of fifteen organizations covering West Texas and the State of New Mexico with a combined membership of 4500. Its goals are to prevent or abolish restrictive abortion legislation as well as government and private actions which impinge on a woman's right to reproductive freedom.

TARRANT COUNTY, TEXAS CHOICE NETWORK is a coalition formed in 1983 and dedicated to keeping abortion safe and legal and to assuring reproductive freedom for all women, regardless of age or economic status.

TRANSNATIONAL FAMILY RESEARCH INSTITUTE (TFRI) is a multidisciplinary, nongovernmental, and nonprofit research organization in the behavioral sciences. TFRI develops and conducts research in reproductive behavior, often in cooperation with colleagues abroad. Research interests focus on the behavioral regulation of fertility, motivations for pregnancy resolution, and the decision making process. TFRI currently has offices in Palo Alto, California; Copenhagen, Denmark; Mexico City, Mexico; and Bangkok, Thailand. Since 1972, the Institute has published *Abortion Research Notes*, reviewing scientific literature related to pregnancy termination.

THE UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE) is a national labor organi-

zation committed to organizing workers regardless of craft, race, nationality, sex, age, religion, political belief, or immigration status and to representing and defending its membership in their efforts to improve their wages. working and living conditions. The UE has a proud history of fighting for the rights of women, not only in the workplace but in the courts and legislative arena as well. The right of poor and working women to obtain safe, legal abortions grew from the horror, illness and death which accompanied illegal abortions and the tragedy which haunts the lives of unwanted children. This history does not bear repeating; poor and working women must be given access to the full range of information and services family planning clinics have to offer.

UNITED STATES STUDENT ASSOCIATION (USSA) is a nationwide nonprofit membership organization which represents approximately two million students at approximately 200 colleges and universities throughout the United States. USSA has a strong commitment to ensuring access to higher education and the right to self-determination for all individuals regardless of age, gender, economic status, race, disability, sexual/affectional orientation, or veteran status.

WOMEN EMPLOYED is a national organization of working women, based in Chicago, with a membership of 1500. Over the past seventeen years, the organization has assisted thousands of working women with problems of sex discrimination. Women Employed works to empower women to improve their economic status and to remove barriers to economic equity through advocacy, direct service and public education. Women Employed strongly believes that any limitations on women's reproductive rights will have a profoundly negative impact on women's opportunities to achieve economic equity.

WASHINGTON WOMEN UNITED (WWU) founded in 1978, is a private nonprofit organization whose purpose is to lobby the Washington state legislature on issues of concern to women. Reproductive choice is WWU's first legislative prior-

ity. The organization has opposed state legislation that would limit a woman's reproductive choice. WWU is also active in a state coalition that has worked to maintain Medicaid funds for abortion.

WOMEN'S ALLIANCE THEOLOGY, ETHICS AND RITUAL (WATER) is a nonprofit educational center that empowers women and men to be religious agents. The cofounders/co-directors work with an interfaith team of ministers, activists and professors to bring about change and move toward inclusivity in church and society. Through programs, projects and publications, WATER provides women and men with resources to foster equality and create a "discipleship of equals." WATER signs the *amicus* brief because the organization is committed to equality and choice for all women, especially for poor women. WATER constituents come from a variety of backgrounds and sets of beliefs on reproductive rights. But the values of free discussion, legal options and religious pluralism are prized among us. We urge this for society as a whole.

WOMEN'S AMERICAN ORT (Organization For Rehabilitation Through Training), a Jewish women's organization consisting of more than 1000 chapters nationwide, reaffirms its long-held position that when and whether to bear a child is a woman's private decision, and should not be subject to intervention through legislation, constitutional amendment, governmental regulation, or judicial decree. The sole determinants for a woman making such a decision should be her own personal convictions, needs and capacities. We deplore any measures which erode these fundamental rights of choice and privacy, including the regulations prohibiting abortion counseling and referral for patients attending clinics funded under Title X of the Public Health Service Act. Not only do these regulations comprise a deprivation of the right of the health provider's full communication and the patient's right to knowledge of her options, they also victimize society's most vulnerable women—the poor and disadvantaged. Women's American ORT will stand firm in its opposition to

any attempts to narrow family planning services or to narrow women's opportunities to control their own lives.

THE WOMEN'S LAW CENTER, INC. is an advocacy organization whose membership consists of attorneys and judges in the State of Maryland. In existence since 1971, the goal of the Women's Law Center is to promote the legal rights of women through litigation, legislation and education. Our organization believes the regulations at issue in *Rust* v. *Sullivan*, which would deny federal funding for family planning programs that provide abortion information, services or referral, pose a critical threat to the reproductive rights of women.

WOMEN LAWYERS' ASSOCIATION OF LOS ANGELES (WLALA), founded in 1919, is the largest local bar association in the State of California emphasizing the concerns of women. WLALA has as members over 1200 female and male lawyers, judges, and law students who are personally and professionally concerned with the importance of preserving a woman's right to choose for herself whether to terminate a pregnancy.

WOMEN LAWYERS' ASSOCIATION OF MICHIGAN is an 1,100-member professional association, founded in 1919 for the purposes of securing the rights of women in society, advancing the interests of women lawyers, improving the administration of justice, and promoting equality and social justice for all people. It adopted a pro-choice policy many years ago, believing it fundamental that constitutional privacy rights protect individuals from governmental intrusion into reproductive decision-making.

WOMEN'S MEDICAL FUND, INC. is a volunteer charity that has helped homeless, indigent and needy women pay for abortions since 1972. Our organization supports the legal action to challenge the Department of Health and Human Services regulations (the "gag rule") relating to abortion because they discriminate against women.